STATE GOVERNMENT OF NEGERI SEMBILAN & ORS v. MUHAMMAD JUZAILI MOHD KHAMIS & ORS

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
AHMAD MAAROP FCJ
HASAN LAH FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEALS NO: 01(f)-8-02-2015(N) & 01-7-02-2015(N)]
8 OCTOBER 2015
[2015] CLJ JT(13)

CONSTITUTIONAL LAW: *Courts – High Court – Jurisdiction – Validity and constitutionality of State Law – Challenge thereto – Whether could be questioned by way of collateral attack in judicial review proceeding in High Court – Whether High Court and Court of Appeal fell into jurisdictional error in entertaining application and appeal thereon – Whether judicial review action rendered incompetent – Proper mode of challenge – Whether to comply with specific procedures laid out in cls. (3) and (4) of art. 4 of Federal Constitution – Whether to commence with leave of judge of Federal Court - Federal Constitution, arts. 4(3), (4), 5(1), 8(2), 9(2) & 10(1) – Syariah Criminal (Negeri Sembilan) Enactment 1992, s. 66*

The respondents in this case had sought to challenge the validity and constitutionality of s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 ('section 66'), and to that end had applied to the High Court by way of judicial review for declarations to that effect. The application, however, was dismissed by the learned judge. The respondents appealed, whereupon the Court of Appeal, upon noting that the respondents were Muslim males suffering from Gender Identity Disorder, and that section 66 had indeed criminalised any Muslim male who sported a woman's attire or posed as a woman in public place, ruled that section 66 had directly affected the respondents, and more, had offended their fundamental liberties as guaranteed by arts. 5(1), 8(2), 9(2), 10(1)(a) and 10(2) of the Federal Constitution. It was the further view of the Court of Appeal that section 66, in so transgressing the respondents' fundamental rights, was unreasonable in nature and purport, thereby rendering it invalid and unconstitutional. The appellants applied for, and having obtained leave to appeal, raised the following preliminary issue before the apex court, namely, that, since the respondents had in actuality challenged the validity or constitutionality of s. 66 on grounds that the State Legislature (of Negeri Sembilan) had no power to enact that provision, the respondents were duty bound to comply with the specific procedure as laid down in cls. (3) and (4) of art. 4 of the Federal Constitution, and commence the application in the Federal Court and with

leave of a judge of that court - and further that - since the respondents had not done so, and had instead initiated the challenge by way of judicial review in the High Court, the application in the High Court was rendered incompetent in law with the result that both the High Court and the Court of Appeal had committed a jurisdictional error when they decided to entertain the application and the appeal thereon. The respondents argued, in retort, that they were not questioning the legislative power of the State Legislature, that their application for judicial review did not fall within the ambit of cls. (3) and (4) of art. 4 of the Federal Constitution, and that the Federal Court, in any case, ought to hear the case on merit as the application had not in any way prejudiced the appellants.

Held (allowing appeal; setting aside judgments of the Court of Appeal and High Court)

Per Raus Sharif PCA delivering the judgment of the court:

(1) The issue here was not whether the appellants were prejudiced by the mode of action undertaken by the respondents. The case raised a larger issue. It was about the jurisdiction of the courts. The fundamental question was whether the validity or constitutionality of section 66 could be challenged in the High Court by way of a collateral attack in a judicial review proceeding. (para 21)

(2) Bearing in mind the majority decision in *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors*, and a host of other decisions of the apex court, the validity or constitutionality of section 66 could not be questioned by way of collateral attack in a judicial proceeding before the High Court. Such challenge could only be made by way of the specific procedure as provided in cls. (3) and (4) of art. 4 of the Federal Constitution. (paras 17, 18, 19 & 25)

(3) The application for declarations sought by the respondents before the High Court by way of judicial review was in fact a challenge to the legislative powers of the State Legislature of Negeri Sembilan. What the respondents wanted to do was to limit the legislative powers of the State Legislature, by saying that despite the powers to legislate on matters on Islamic law having been given to the State Legislature by art. 74 of the Federal Constitution read with List II in the Ninth Schedule thereof, that legislation must still comply with the provisions on fundamental liberties in arts. 5(1), 8(2), 9(2) and 10(1) of the Federal Constitution. The application for the declarations sought by the respondents was incompetent by reason of substantive procedural non-compliance with cls. (3) and (4) of art. 4 of the Federal Constitution, and should have been dismissed by the High Court on the ground that the High Court had no jurisdiction to hear the matter. (paras 26 & 29)

(4) Since the respondents had failed to follow the specific procedures as laid down in cls. (3) and (4) of art. 4 of the Federal Constitution, the learned judges of the Court of Appeal as well as the High Court were in grave error in entertaining the respondents' application to question the validity or constitutionality of section 66 by way of judicial review. Both the courts below were not seized with jurisdiction to do so, and the proceedings heard by them were null and *void ab initio*. (para 28)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden dalam kes di sini berhasrat untuk mencabar kesahan dan keperlembagaan s. 66 Enakmen Jenayah (Negeri Sembilan) 1992 ('seksyen 66'), dan berikutnya telah memohon ke Mahkamah Tinggi melalui permohonan semakan kehakiman untuk beberapa perisytiharan berkaitan dengannya. Permohonan bagaimanapun telah ditolak oleh Mahkamah Tinggi. Responden-responden merayu dan Mahkamah Rayuan, atas pemerhatian bahawa responden-responden adalah lelaki-lelaki Islam yang menghidapi sindrom Gender Identity Disorder, dan bahawa seksyen 66 sebenarnya telah menjenayahkan perbuatan mana-mana lelaki Muslim yang memakai pakaian wanita atau yang berkelakuan sebagai seorang wanita di tempat-tempat awam, telah memutuskan bahawa seksyen 66 secara langsung telah memberi kesan kepada responden-responden, dan lebih dari itu, telah menjejaskan hak-hak asasi responden-responden sepertimana yang dijamin oleh per. 5(1), 8(2), 9(2), 10(1)(a) dan 10(2) Perlembagaan Persekutuan. Juga menjadi pandangan Mahkamah Rayuan bahawa seksyen 66, dalam melanggar hak-hak asasi responden-responden, adalah tidak munasabah pada sifat dan matlamatnya, sekaligus menjadikannya tidak sah dan tidak berperlembagaan. Perayu-perayu memohon, dan apabila memperoleh kebenaran untuk merayu, telah membangkitkan isu awalan berikut di hadapan mahkamah tertinggi, iaitu, bahawa, oleh kerana responden-responden pada hakikatnya mencabar kesahan atau keperlembagaan seksyen 66 atas alasan bahawa Badan Perundangan Negeri (Negeri Sembilan) tidak mempunyai kuasa untuk menggubal peruntukan tersebut, maka responden-responden mestilah mematuhi prosedur khusus seperti yang dibentangkan oleh perenggan-perenggan (3) dan (4) per. 4 Perlembagaan Persekutuan, dan seterusnya memulakan permohonan di Mahkamah Persekutuan dengan kebenaran seorang hakim mahkamah tersebut - dan selanjutnya bahawa - oleh kerana responden-responden gagal berbuat demikian dan sebaliknya telah memulakan pencabaran melalui semakan kehakiman di Mahkamah Tinggi, maka permohonan mereka di Mahkamah Tinggi telah menjadi tidak berkompeten sekaligus menyebabkan kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan melakukan kekhilafan bidang kuasa apabila kedua-duanya memutuskan untuk melayani permohonan dan mendengar rayuan permohonan tersebut. Responden-responden bagaimanapun berhujah bahawa

mereka tidak mempersoalkan kuasa membuat undang-undang Badan Perundangan Negeri, bahawa permohonan semakan kehakiman tidak dirangkumi oleh perenggan-perenggan (3) dan (4) per. 4, dan walau apapun, bahawa Mahkamah Persekutuan seharusnya mendengar kes di atas merit memandangkan permohonan sekali-kali tidak memprejudis perayu-perayu.

Diputuskan (membenar rayuan; mengetepikan keputusan Mahkamah Rayuan dan Mahkamah Tinggi)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Isu di sini bukanlah sama ada perayu-perayu telah diprejudis oleh cara responden-responden memulakan tindakan. Kes ini telah membangkitkan isu yang lebih besar. Ianya berkait dengan bidang kuasa mahkamah. Persoalan pentingnya adalah sama ada kesahan atau keperlembagaan seksyen 66 boleh dicabar di Mahkamah Tinggi melalui serangan kolateral dalam prosiding semakan kehakiman.

(2) Mengambil kira penghakiman majoriti di dalam *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors*, dan beberapa keputusan mahkamah tertinggi yang lain, kesahan dan keperlembagaan seksyen 66 tidak boleh dipersoal melalui serangan kolateral dalam prosiding semakan kehakiman di Mahkamah Tinggi. Cabaran sedemikian hanya boleh dibuat melalui prosedur khusus seperti yang diperuntukkan oleh perenggan-perenggan (3) dan (4) fasal 4 Perlembagaan Persekutuan.

(3) Permohonan deklarasi yang dipohon oleh responden-responden di Mahkamah Tinggi melalui semakan kehakiman adalah sebenarnya satu tindakan untuk mencabar kuasa membuat undang-undang Badan Perundangan Negeri, Negeri Sembilan. Apa yang dikehendaki oleh responden-responden adalah untuk menghadkan kuasa membuat undang-undang Badan Perundangan Negeri, iaitu dengan mengatakan bahawa walaupun kuasa untuk menggubal undang-undang mengenai perkara-perkara yang berkait dengan undang-undang Islam telah diberi kepada Badan Perundangan Negeri oleh per. 74 Perlembagaan Persekutuan dibaca bersama Senarai II Jadual Kesembilan, undang-undang yang digubal tersebut mestilah mematuhi peruntukan-peruntukan hak asasi yang termaktub dalam per. 5(1), 8(2), 9(2) dan 10(1) Perlembagaan Persekutuan. Permohanan deklarasi yang dibuat oleh responden-responden adalah tidak berkompeten disebabkan oleh ketidakpatuhan substantif terhadap prosedur yang ditetapkan di perenggan-perenggan (3) dan (4) per. 4 Perlembagaan Persekutuan, dan seharusnya ditolak oleh Mahkamah Tinggi atas alasan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar hal perkara tersebut.

(4) Oleh kerana responden-responden gagal mengikuti prosedur khusus seperti yang dibentangkan oleh perenggan-perenggan (3) dan (4) per. 4 Perlembagaan Persekutuan, maka yang arif hakim-hakim Mahkamah Rayuan dan juga Mahkamah Tinggi telah melakukan kesilapan besar apabila melayani permohonan responden-responden untuk mempersoal kesahan atau keperlembagaan seksyen 66 melalui semakan kehakiman. Kedua-kedua mahkamah di bawah tersebut tidak mempunyai bidang kuasa untuk berbuat demikian, dan prosiding yang didengari mereka adalah batal dan tak sah *ab initio*.

Case(s) referred to:

Abdul Karim Abdul Ghani v. The Legislative Assembly Of The State Of Sabah [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1 SC ***(refd)***

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, ss. 4, 78(1), 79

Federal Constitution, arts. 4, 5(1), 8(1), (2), 9(2), 10(1)(a), (2)

Rules of the High Court 1980, O. 53 r. 3(1)

Syariah Criminal (Negeri Sembilan) Enactment 1992, s. 66

For the 1st-5th appellants - Muhammad Shafee Abdullah (Iskandar Ali Dewa, Muhammad Fairuz Iskandar, Sarah Abishegam, Farhah Mustaffa, Fakrul & Fazrein with him); State Legal Advisor, Negeri Sembilan

For the 6th appellant - Sulaiman Abdullah (Haniff Kahtri, Fakhrul Azman Abu Hasan & Mohamed Reza Abu Hasan with him); M/s Azaine & Fakhrul

For the respondents - Aston Paiva (Fahri Azzat & Siti Zabedah Kasim with him); M/s Azzat & Izzat

Amicus Curiae

Attorney General's Chambers - Suzana Atan, Iskandar Bolhasan SFCs

Malaysian Bar - Farez Jinnah, Syahredzan Johan

Malaysian Aids Council

PT Foundation

All Women's Action Society (AWAM)

SIS Forum Malaysia

Women's Aid Organization (WAO)

Persatuan Pergerakan Komuniti Selangor (EMPOWER) - Honey Tan Lay Ean

Majlis Agama Islam Negeri Johor - Mubashir Mansor, Ridha Abdah Subri

United Malay National Organization (UMNO) - Shaharudin Ali, Adzly Ab Manas

Majlis Agama Islam Pulau Pinang & Majilis Agama Islam dan Adat Melayu Perak - Zainul Rijal Abu Bakar, Abdul Rahim Sinwan, Muhammad Zaki Sukery

Majlis Agama Islam Wilayah Persekutuan - Zulkifli Che Yong, Ilyani Noor Kuszairy

International Commission of Jurists - New Sin Yew, Andrew Yong

Watching Brief
Persatuan Peguam Muslim Malaysia (PMM) - Mohd Fasha Musthafa
Angkatan Belia Islam Malaysia (ABIM) - Mohd Khairul Anwar Ismail, Mohd Raimi Ab Rahim, Kamarul Arifin Wafa, Bakhtiar Roslan
Persatuan Peguam Syarie Malaysia (PGSM) - Rosfinah Rahmat

[Editor's note: For the Court of Appeal judgment, please see Muhamad Juzaili Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors [2015] 1 CLJ 954 (overruled).]

Reported by Wan Sharif Ahmad

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal against the decision of the Court of Appeal declaring s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 (section 66) to be invalid as being unconstitutional due to inconsistency with arts. 5(1), 8(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution.

[2] The first appellant is the State Government of Negeri Sembilan. The second appellant is the Islamic Affairs Department of Negeri Sembilan, which is a department of the first appellant responsible for Islamic affairs within the State of Negeri Sembilan. The third appellant is the director of the second appellant.

[3] The fourth appellant is the Chief Religious Enforcement Officer of Negeri Sembilan, who is appointed pursuant to s. 79 of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003. Amongst his duties is the carrying out of the investigations under any written law in Negeri Sembilan prescribing offences against the precepts of the religion of Islam.

[4] The fifth appellant is the Chief Syarie Prosecutor of Negeri Sembilan who is appointed pursuant to s. 78(1) of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003. The fifth appellant has the power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence before a Syariah Court in Negeri Sembilan.

[5] The sixth appellant is a body established under s. 4 of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 to aid and advise the Yang di-Pertuan Besar of Negeri Sembilan in matters relating to the religion of Islam.

[6] The three respondents are bridal make-up artists professing the religion of Islam. They are men suffering from a medical condition called Gender Identity Disorder (GID). Due to their condition, the respondents have been expressing themselves as women and showing mannerisms of the feminine gender such as wearing women's clothes and makeup.

A **Background Facts**

[7] On 4 November 2011, the respondents were granted leave to file an application for judicial review by the Seremban High Court under O. 53 r. 3 of the Rules of the High Court 1980 (RHC 1980). The reliefs sought by the respondents are as follows:

B

(a) a declaration that section 66 is inconsistent with arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution and is thus null and void;

(b) alternatively, a declaration that s. 66 has no effect and does not apply to any person who is:

C

(i) psychologically a woman; and

(ii) suffering from "GID";

(c) alternatively, a prohibition order or a revision according to para. 1 of the schedule to the Courts of Judicature Act 1964 to be issued to the

D

Chief Religious Enforcement Officer of Negeri Sembilan (the fourth appellant) and the Chief Syarie Prosecutor of Negeri Sembilan (the fifth appellant) restraining them from carrying out an investigation or proceeding with an investigation for an offence under the impugned s. 66 against the respondents and against any person, if they submit a

E

report from a psychologist that they are psychologically women or suffer from "GID".

[8] On 11 October 2012, the respondents' application for judicial review was dismissed by the High Court. Aggrieved, the respondents filed an appeal to the Court of Appeal.

F

[9] On 7 November 2014, the Court of Appeal allowed the appeal and amongst others declared that section 66 was unconstitutional as being inconsistent with arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution.

G **[10]** The first to the fifth appellants then filed an application for leave to appeal to the Federal Court. At the same time, the sixth appellant, together with Majlis Agama Islam Wilayah Persekutuan, Majlis Agama Islam dan Adat Melayu Perak, Majlis Agama Islam Negeri Pulau Pinang, Majlis Agama Islam Negeri Johor, applied for leave to intervene.

H **[11]** The applications to intervene by the proposed interveners were heard together with the application for leave to appeal by the first to the fifth appellants. On 27 January 2015, the Federal Court granted the first to the fifth appellants leave to appeal against the decision of the Court of Appeal. At the same time the Federal Court allowed only the Majlis Agama Islam

I

Negeri Sembilan to intervene as a party in the substantive appeal. The Majlis Agama Islam Negeri Sembilan now appears herein as the sixth appellant and

the Federal Court also extended an invitation to the other proposed interveners (whose applications to intervene were dismissed) to appear as *amicus curiae* to assist the court on legal and/or constitutional issues at the hearing of the appeal.

Question Of Law

[12] The principal question of law posed by the appellants in this appeal is as follows:

> Whether section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 [Enactment No. 4/1992] contravenes Article 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution,

[13] Section 66 provides:

> Any male person who, in any public place, wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

[14] As stated earlier, the Court of Appeal was of the view that section 66 is invalid and unconstitutional. Firstly, it offends the fundamental liberties as enshrined in arts. 5(1), 8(2) and 9(2) of the Federal Constitution. Secondly, section 66 has the effect of restricting the freedom of speech and expression under art. 10(1)(a) when under art. 10(2) only Parliament has the power to enact such law and the State Legislature has no power to enact the same. Additionally, it was held that the restriction to freedom of expression imposed by s. 66 is unreasonable which renders it unconstitutional. The relevant judgment of the Court of Appeal speaking through Mohd Hishamuddin JCA is reproduced below:

> [73] Section 66 directly affects the appellants' right to freedom of expression, in that they are prohibited from wearing the attire and articles of clothing of their choice.
>
> [74] Article 10(2)(a) states that only Parliament may restrict freedom of expression in limited situations; and so long as such restrictions are reasonable.
>
> [75] The State Legislative Assemblies in Malaysia (and this includes the State Legislature of Negeri Sembilan) have no power to restrict freedom of speech and expression. Only Parliament has such power. This is confirmed by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697 at p. 717; [1992] 1 CLJ (Rep) 72 at p 82:
>
> > Next it must be observed that art 10(2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in arts. 10(2), (3) and (4) of the Federal Constitution. Therefore even if any such restriction purported to have been imposed by the Constitution of the State of Kelantan was valid,

A and it is not, it is clear that the restriction could not be imposed by a law passed by any State Legislature. That would be another ground why Article XXXIA of the Constitution of Kelantan should be invalidated.

[76] Section 66 is a state law that criminalises any male Muslim who wears a woman's attire or who poses as a woman in a public place. Hence, s. B 66 is unconstitutional since it is a law purporting to restrict freedom of speech and expression but it is a law not made by Parliament.

[77] Moreover, any restriction on freedom of expression must be reasonable. In *Sivarasa Rasiah* the Federal Court held:

C [5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2)(c). It says that 'Parliament may by law impose - (c) on the right conferred by para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of the security of the D Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* E [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment.

(See also *Dr Mohd Nasir Hashim* and *Muhammad Hilman*)

[78] Clearly, the restriction imposed on the appellants and other GID F sufferers by s. 66 is unreasonable. Thus, also from the aspect of reasonableness, s. 66 is unconstitutional.

Preliminary Issue

[15] It was submitted by learned counsel for the first to the fifth appellants that the net effect of the findings of the Court of Appeal is that the Negeri G Sembilan State Legislature has no power to enact section 66. It was pointed out that when such validity or constitutionality of the law is challenged on that ground, namely that the State Legislature has no power to enact the law, the specific procedure as laid down in cls. (3) and (4) of art. 4 of the Federal Constitution must be complied with.

H **[16]** Clauses (3) and (4) of art. 4 of the Federal Constitution provide:

4. (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except I in proceedings for a declaration that the law is invalid on that ground or -

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[17] It was pointed out by learned counsel that cls. (3) and (4) of art. 4 of the Federal Constitution were extensively deliberated upon by the Federal Court in *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 where Suffian LP held as follows:

Under our Constitution written law may be invalid on one of these grounds:

(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State Legislature has no power to make law, article 74; or

(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The court has power to declare any Federal or State law invalid on any of the above three grounds.

The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, clause (3) of article 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more States; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for anyone to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, clause (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in land.

[18] Learned counsel also referred to the case of *Abdul Karim Abdul Ghani v. The Legislative Assembly Of The State Of Sabah* [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1; [1988] 1 MLJ 171 where Hashim Yeop Sani, SCJ explained the underlying purposes of cls. (3) and (4) of art. 4 of the Federal Constitution:

The object and purport of Article 4(4) of the Federal Constitution has already been interpreted before in *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No 2)* [1967] 1 Mil 46 by Pike C.J. (Borneo) with which interpretation I agree. *Articles 4(3) and (4) of the Federal Constitution are designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally*. The articles require that such law may only be questioned in proceedings for a declaration that the law is invalid. *The subject must ask for a specific declaration of invalidity. In order to secure that frivolous or vexatious proceedings for such declarations are not commenced, Article 4(4) requires that the leave of a judge of the Supreme Court must first be obtained*. (emphasis added)

[19] Learned counsel for the sixth appellant fully adopted the submission on the issues raised above. He further pointed out that the declaration sought by the respondents that section 66 is void for being inconsistent with arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution should have been rejected by the High Court on the ground that the High Court had no

jurisdiction to hear the matter. According to him, the respondents should have filed an application for leave to a judge of the Federal Court pursuant to cl. 4 of art. 4 of the Federal Constitution and thereafter, if leave is granted, the respondents may then proceed to file the case as an original action for those declarations before the Federal Court, and not by way of judicial review before the High Court, as was done in this case.

[20] In response, learned counsel for the respondents submitted that the respondents were not questioning the legislative power of the State Legislature and therefore their application does not fall strictly within cls. (3) and (4) of art. 4 of the Federal Constitution. For that reason the respondents did not have to follow the procedure as specified in cls. (3) and (4) of art. 4 of the Federal Constitution. Further and in the alternative, it was submitted that the respondents' application by way of judicial review has not in any way prejudiced the appellants. Thus, he urged this court to hear the case on its merit.

[21] With respect, we are unable to agree with learned counsel for the respondents. The issue here is not whether the appellants are in any way being prejudiced by the mode of action undertaken by the respondents. This case raises a larger issue. It is about the jurisdiction of the courts. The fundamental question is, could the validity or constitutionality of section 66 be challenged in the High Court by way of a collateral attack in a judicial review proceeding?

[22] The Federal Court in the recent decision of *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541; [2014] 4 MLJ 765, had held that the validity or constitutionality of the laws could not be questioned by way of collateral attack in a judicial review proceeding. In that case, the applicant filed an application for judicial review under O. 53 r. 3(1) of the RHC 1980, challenging the decision of the Minister which imposed the condition that the applicant was prohibited from using the word "Allah" in Herald - The Catholic Weekly. In the judicial review application before the High Court, the applicant challenged the validity or constitutionality of s. 9 of the relevant State Enactment which made it an offence for a person who is not a Muslim to use the word "Allah" except by way of quotation or reference. The High Court held that:

> [53] ... the correct way of approaching s. 9 is it ought to be read with art. 11(4). If s. 9 is so read in conjunction with art 11(4), the result will be that a non-Muslim could be committing an offence if he uses the word 'ALLAH' to a Muslim but there would be no offence if it was used to a non-Muslim. Indeed art. 11(1) reinforces this position as it states 'Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it' Clause 4 restricts a person's right only to propagate his religious doctrine or belief to persons professing the religion of Islam. So long as he does not propagate his religion to persons not

professing the religion of Islam, he commits no offence. It is significant to note that art. 11(1) gives freedom for a person to profess and practise his religion and the restriction is on the right to propagate.

[57] … On the other hand the object of art. 11(4) and the State Enactments is to protect or restrict propagation to persons of the Islamic faith. Seen in this context by no stretch of imagination can one say that s. 9 of the State Enactments may well be proportionate to the object it seeks to achieve and the measure is therefore arbitrary and unconstitutional. Following this it shows the first respondent has therefore taken an irrelevant consideration.

[80] With regard to the contention that the publication permit is governed by the existence of the State Enactments pertaining to the control and restriction of the propagation of non-Islamic religions among Muslim, it is open to the applicant in these proceedings to challenge by way of collateral attack the constitutionality of the said Enactment on the ground that section 9 infringe the applicant's fundamental liberties under articles 3, 10, 11 and 12 of the Federal Constitution.

[23] The decision of the High Court was set aside by the Court of Appeal. In the applicant's application to obtain leave to appeal to the Federal Court, Arifin Zakaria CJ delivering the majority judgment held that:

The net effect of the finding of the learned High Court judge is that the impugned provision is invalid, null and void, and unconstitutional as it exceeds the object of art. 11(4) of the Federal Constitution. The respective State Legislature thus has no power to enact the impugned provision. The issue is, could the High Court judge entertain such a challenge in light of specific procedure in cls. (3) and (4) of art 4 of the Federal Constitution.

[24] In answering the question Arifin Zakaria CJ held:

[42] The effect of cl. (3) and (4) of art 4 as explained by the Supreme Court in *Abdul Karim bin Abdul Ghani* is that the validity or constitutionality of the laws could not be questioned by way of collateral attack, as was done in the present case. This is to prevent any frivolous or vexatious challenge being made on the relevant legislation. Clause (3) of art. 4 provides that the validity or constitutionality of the relevant legislation may only be questioned in proceedings for a declaration that the legislation is invalid. And cl. (4) of art. 4 stipulates that such proceedings shall not be commenced without the leave of a judge of the Federal Court. This procedure was followed in a number of cases (see *Fathul Bari bin Mat Jahya; Sulaiman bin Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54 (FC); *Mamat bin Daud & Ors v. Government of Malaysia* [1986] 2 MLJ 192; [1986] CLJ Rep 190 (SC)).

[25] It was on the above premise that the Federal Court, by a majority, following the earlier cases of *Ah Thian v. Government of Malaysia (supra)* and *Abdul Karim Abdul Ghani v. State Legislative Assembly of Sabah (supra)*, ruled

that the validity or constitutionality of the laws could not be questioned by way of collateral attack in a judicial review proceeding before the High Court. Such challenge could only be made by way of the specific procedure as provided for in cls. (3) and (4) of art. 4 of the Federal Constitution.

[26] Similarly, in the present case, the application for judicial review filed by the respondents was *inter alia* to seek a declaration that s. 66 is null and void for being inconsistent with arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. We are of the view that the application for the declarations sought by the respondents before the High Court by way of judicial review was in fact, a challenge to the legislative powers of the State Legislature of Negeri Sembilan. What the respondents attempted to do was to limit the legislative powers of the State Legislature, by saying that despite the powers to legislate on matters on Islamic law having been given to the State Legislature by art. 74 of the Federal Constitution read with List II in the Ninth Schedule to the Federal Constitution, that legislation must still comply with the provisions on fundamental liberties in arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. The application for the declarations sought by the respondents should have been dismissed by the High Court on the ground that the High Court has no jurisdiction to hear the matter.

[27] Thus, we are not persuaded by the submissions of learned counsel for the respondents that the respondents are not questioning the legislative powers of the State Legislature. The respondents' argument, that the legislation on Islamic law passed by the State Legislature must comply with the provisions on fundamental liberties in arts. 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution, is an argument that directly questions the legislative powers of the State Legislature. For all intent and purposes, it was a direct challenge to the validity or constitutionality of section 66 passed by the State Legislature of Negeri Sembilan. As stated earlier, such a challenge must be in accordance with the specific procedure as specified in cls. (3) and (4) of art. 4 the Federal Constitution.

[28] We are of the view that since the respondents had failed to follow the specific procedure as laid down in cls. (3) and (4) of art. 4 of the Federal Constitution, the learned judges of the Court of Appeal as well as the High Court were in grave error in entertaining the respondents' application to question the validity or constitutionality of s. 66 by way of judicial review. The courts below were not seized with the jurisdiction to do so. It is trite that any proceeding heard without jurisdiction or power to do so is null and *void ab initio*. (See *Ah Thian v. Government of Malaysia (supra)*; *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors (supra)* and *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393).

[29] In the circumstances, for the reasons stated above, we allow the appeal solely on the preliminary issue raised by the appellants. We hereby set aside the judgments of the Court of Appeal as well as the High Court and declare that the judicial review action by the respondents is incompetent by reason of substantive procedural non-compliance with cls. (3) and (4) of art. 4 of the Federal Constitution.

[30] As the appellants are not asking for costs, we made no order as to costs.